

THE HONORABLE BARBARA J. ROTHSTEIN

FILED
LODGED
JAN 29 2002
ENTERED
RECEIVED
1/30/02

ORIGINAL

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY *[Signature]*

FILED
LODGED
JAN 04 2002
ENTERED
RECEIVED
DJ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY *[Signature]* DEPUTY

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION

MDL Docket No. 1407

CASE MANAGEMENT ORDER
NO. 2
(Protective Order Regarding
Confidential Documents)

This document relates to all actions

WHEREAS, Rule 26(c) of the Federal Rules of Civil Procedure provides
for the issuance of protective orders limiting the disclosure of discovered information in
appropriate circumstances.

NOW, THEREFORE, IS HEREBY ORDERED THAT:

1. This Order applies to all documents and other products of discovery, all
information derived therefrom and including, but not limited to, all copies, excerpts or
summaries thereof, obtained by the plaintiffs or defendants pursuant to the
requirements of any court order, the requirements of self-executing discovery, requests
under Rule 34 of the Federal Rules of Civil Procedure, answers to requests for

1 admissions under Rule 36 of the Federal Rules of Civil Procedure, answers to
2 interrogatories under Rule 33 of the Federal Rules of Civil Procedure, documents
3 subpoenaed under Rule 45 of the Federal Rules of Civil Procedure, and transcripts of
4 depositions under Rule 30 or Rule 31 of the Federal Rules of Civil Procedure (hereafter
5 "Discovery Material").
6

7 2. The parties have agreed that Discovery Material hereof will be used only
8 for the litigation of actions under IN RE: PHENYLPROPANOLAMINE (PPA)
9 PRODUCTS LIABILITY LITIGATION, MDL Docket No. 1407 ("Litigation"), including any
10 appeals of this Litigation, and for any other PPA action pending in a state or federal
11 court so long as the parties have agreed to be governed by the terms of this Order.
12 Discovery Material will not be disclosed except in accordance with paragraph 7.
13

14 a. Prior to giving access to any person falling within subparagraphs 7
15 (a) (vi) or 7 (a) (viii) to Discovery Material designated as confidential pursuant to
16 paragraph 3 of this Order, counsel for the party intending to disclose such confidential
17 Discovery Material shall furnish a copy of this Order to the person being given access.
18 Any person falling within subparagraphs 7(a) (vi) or 7(a) (viii) being given access to
19 Discovery Material shall execute a copy of this Agreed Protective Order in the space
20 provided on Exhibit A. Counsel retaining a testifying expert shall furnish a copy of this
21 Agreed Protective Order executed by the testifying expert to counsel who produced the
22 confidential Discovery Material at the time the confidential Discovery Material is
23 provided to the testifying expert, or at the time the party's expert designation is served,
24 whichever is later. For purely consulting experts, the party retaining the expert shall
25 furnish to the party who designated the Discovery Material a copy of the Agreed
26
27
28

1 Protective Order executed by the consulting expert at the conclusion of this lawsuit as to
2 the party designating the confidential Discovery Material.
3

4 3. Persons producing Discovery Material may designate as confidential
5 Discovery Material containing trade secrets, or other confidential or proprietary
6 research, development, manufacturing or commercial or business information
7 ("Confidential Discovery Material"). Without prejudice to the right of the producing party
8 to object to the production of the following information or of the requesting party to seek
9 production, the information subject to such designation shall include the producing
10 party's:
11

12 a. Customer names;

13 b. Proprietary licensing, distribution, marketing, design,
14 development, research and manufacturing information regarding
15 products and medicines, whether previously or currently marketed
16 or under development;
17

18 c. Clinical studies;

19 d. Information concerning competitors;

20 e. Production information;

21 f. Personnel records and information;

22 g. Financial information not publicly filed with any federal
23 or state regulatory authorities; and
24

25 h. Information submitted to the FDA or other
26 governmental agency, that under applicable regulations is exempt
27 from disclosure under the Freedom of Information Act.
28

1
2 4. Confidential Discovery Material, if a writing, shall have the following
3 language stamped on the face of the writing, or shall otherwise have such language
4 clearly marked:
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**CONFIDENTIAL
SUBJECT TO PROTECTIVE
ORDER**

Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying but prior to the actual copying if done expeditiously. The stamp shall be affixed in such manner as not to obliterate or obscure any written matter. In the case of deposition testimony, confidentiality designations shall be made within thirty (30) days after the transcript has been received by counsel making the designation, and shall specify the testimony being designated confidential by page and line number(s). Until the expiration of such 30 day period, the entire text of the deposition, including all testimony therein and exhibits thereto, shall be treated as confidential under this Protective Order. In the event that the producing person inadvertently fails to designate Discovery Material as confidential in this or any other litigation, it may make such a designation subsequently by notifying all parties to whom such Discovery Material was produced, in writing as soon as practicable. After receipt of such notification, the parties to whom production has been made shall treat the designated Discovery Material as confidential, subject to their right to dispute such designation in accordance with paragraph 8 hereof.

5. In the event that any question is asked at a deposition which a party or nonparty asserts calls for confidential information, such question shall nonetheless be answered by the witness fully and completely, to the extent required by law. Counsel for the deponent shall, either at the deposition or within thirty (30) days after receipt of

1 the transcript thereof by said counsel, notify all counsel on the record or in writing, that
2 the information provided in such answer is confidential.
3

4 6. Confidential Discovery Material shall be used solely for the purposes of
5 this Litigation and for no other purpose without prior written approval from the Court or
6 the prior written consent of the producing person. All persons receiving or given access
7 to Confidential Discovery Material in accordance with the terms of this Protective Order
8 consent to the continuing jurisdiction of the Court for the purposes of enforcing this
9 Protective Order and remedying any violations thereof.
10

11 7. Confidential Discovery Material shall not be disclosed to anyone other
12 than the following categories of persons:

13 a. The Court (and any appellate court), including court personnel,
14 jurors, and alternate jurors only in the manner provided in paragraph 10 below.
15

16 b. With respect to Confidential Discovery Material produced by
17 plaintiffs, defendants' in-house counsel, in-house paralegals and outside counsel,
18 including any attorneys employed by or retained by defendants' outside counsel who
19 are assisting in connection within this Litigation, and the paralegal, clerical, secretarial,
20 and other staff employed or retained by such outside counsel or retained by the
21 attorneys employed by or retained by defendants' outside counsel.
22

23 c. With respect to Confidential Discovery Material produced by
24 defendants, plaintiffs' attorneys in this Litigation, including the paralegal, clerical,
25 secretarial, and other staff employed or retained by such counsel, as well as plaintiffs'
26 attorneys in other filed litigation involving PPA, including their paralegal, clerical,
27
28

1
2 secretarial and other staff employed or retained by such counsel, provided that such
3 counsel has agreed to be governed by the terms of this Order.

4 d. With respect to Confidential Discovery Material produced by any
5 Defendant, outside counsel for any other Defendant, including any attorneys employed
6 by or retained by any other Defendant's outside counsel who are assisting in connection
7 with the this Litigation, and the paralegal, clerical, secretarial, and other staff employed
8 or retained by such outside counsel.

9
10 e. Court reporters (including persons operating video recording
11 equipment at depositions) and persons preparing transcripts of testimony to the extent
12 necessary to prepare such transcripts.

13 f. Retained experts, advisors and consultants (including persons
14 directly employed by such experts, advisors and consultants), but only to the extent
15 necessary to perform their work in connection with this Litigation.

16
17 i. If plaintiffs or their counsel wish to disclose Confidential
18 Discovery Material to an expert, advisor, or consultant who is an employee,
19 officer, director, agent, contractor, subcontractor or consultant of any entity that is
20 or potentially may be engaged in the research, development, manufacture or sale
21 of any product for the treatment of cough, cold or allergy symptoms, or for the
22 assistance in weight loss, or in any other way is or may be a potential competitor
23 of any Defendant, plaintiff(s) or his/her/their counsel shall promptly so notify the
24 disclosing party's counsel, including with such notification a copy of the expert's
25 curriculum vitae prior to disclosing any Confidential Discovery Material to that
26 expert advisor or consultant. Within five (5) business days of receiving such
27
28

1 notification and curriculum vitae, the disclosing party's counsel shall notify
2 plaintiff's counsel whether the disclosing party objects to the disclosure of
3 Confidential Discovery Material to the proposed expert. Any such objection shall
4 be made in good faith and on reasonable grounds. If an objection is made and
5 not resolved by the parties, the party objecting to disclosure shall file a motion (or
6 letter to the Court) in support of that objection within seven (7) business days of
7 the objection. Under no circumstances shall Confidential Discovery Material be
8 disclosed to an expert, advisor, or consultant who is an employee, officer,
9 director, agent, contractor, subcontractor or consultant of any entity that is or
10 potentially may be engaged in the research, development, manufacture or sale of
11 any product for the treatment of cough, cold or allergy symptoms, or for the
12 assistance of weight loss, in any other way is or may be a potential competitor of
13 any Defendant, unless and until the parties resolve the matter, the objection is
14 withdrawn, the Court permits disclosure, or defendants fail to object to such
15 disclosure or file a motion in support of their objection within the times specified
16 herein (or other schedule agreed among the parties).
17
18
19

20 ii. If counsel for any Defendant wishes to disclose Confidential
21 Discovery Material to an expert, advisor, or consultant who is an employee,
22 officer, director, agent, contractor, subcontractor or consultant of any entity that is
23 or potentially may be engaged in the research, development, manufacture or sale
24 of any product for the treatment of cough, cold or allergy symptoms, or for the
25 assistance in weight loss, or in any other way is or may be a potential competitor
26 of any Defendant, the Defendant wishing to make such disclosure or its counsel
27
28

1 shall promptly so notify counsel for any Defendant who is a competitor or
2 potential competitor of said entity, including with such notification a copy of the
3 expert's curriculum vitae prior to disclosing any Confidential Discovery Material to
4 that expert advisor or consultant. Within five (5) business days of receiving such
5 notification and curriculum vitae, counsel for the Defendant(s) who is a
6 competitor or potential competitor of said entity shall notify the counsel for the
7 Defendant who wishes to make the disclosure whether they object to the
8 disclosure of Confidential Discovery Material to the proposed expert. Any such
9 objection shall be made in good faith and on reasonable grounds. If an objection
10 is made and not resolved by the parties, the party making the objection shall file
11 a motion (or letter to the Court) in support of that objection within seven (7)
12 business days of the objection. Under no circumstances shall Confidential
13 Discovery Material be disclosed to an expert, advisor, or consultant who is an
14 employee, officer, director, agent, contractor, subcontractor or consultant of any
15 entity that is or potentially may be engaged in the research, development,
16 manufacture or sale of any product for the treatment of cough, cold or allergy
17 symptoms, or for assistance in weight loss, or in any other way is or may be a
18 potential competitor of any Defendant, unless and until the parties resolve the
19 matter, the objection is withdrawn, the Court permits disclosure, or the parties
20 who oppose the disclosure fail to object to such disclosure or file a motion in
21 support of their objection within the times specified herein (or other schedule
22 agreed among the parties).

23
24
25
26
27 g. The author or recipient of the Confidential Discovery Material.
28

1
2 h. Such persons as the undersigned counsel shall consent to in
3 writing before the proposed disclosure.

4 8. All outside counsel, in-house counsel, plaintiff's counsel, in-house
5 paralegals and the employees and assistants of all counsel receiving discovery shall
6 take all steps reasonably necessary to prevent the disclosure of Confidential Discovery
7 Material other than in accordance with the terms of this Order.

8
9 9. Disclosure of Confidential Discovery Material other than in accordance
10 with the terms of this Protective Order may subject the disclosing person to such
11 sanctions and remedies as the Court may deem appropriate.

12 10. a. If at any time a party wishes for any reason to dispute a designation
13 of Discovery Material as confidential hereunder, such party shall notify the designating
14 party of such dispute in writing, specifying the Discovery Material in dispute and the
15 nature of the dispute. If the parties are unable amicably to resolve the dispute, the
16 disputing party may apply by motion to the Court for a ruling as to whether the
17 designated Discovery Material may properly be treated as confidential. The designating
18 party shall have the burden of proof on such motion to establish the propriety of its
19 confidentiality designation.
20

21 b. All Discovery Material designated as confidential under this Order,
22 whether or not such designation is in dispute pursuant to subparagraph 8(a) above,
23 shall retain that designation and be treated as confidential in accordance with the terms
24 hereof unless and until:
25

26 i. The producing party agrees in writing that the material is no
27 longer confidential and subject to the terms of this Order; or
28

1
2 ii. This Court enters an Order that the matter shall not be
3 entitled to confidential status and that Order is not subject to an appellate stay within
4 twenty (20) days after it is issued.

5 c. The parties shall negotiate in good faith before filing any motion
6 relating to this Order.

7 11. Any non-party may subscribe to the terms and protections of this
8 Protective Order by designating Discovery Materials that the non-party is producing
9 (whether written documents, deposition testimony, or other) as set forth in paragraph 4.

10 12. Any Confidential Discovery Material that is filed with the Court, and any
11 pleading, motion or other paper filed with the Court containing or disclosing any such
12 Confidential Discovery Material shall be filed under seal and shall bear the legend:
13

14 "THIS DOCUMENT CONTAINS
15 CONFIDENTIAL INFORMATION COVERED
16 BY A PROTECTIVE ORDER OF THE COURT
17 AND IS SUBMITTED UNDER SEAL
18 PURSUANT TO THAT PROTECTIVE ORDER.
19 THE CONFIDENTIAL CONTENTS OF THIS
20 DOCUMENT MAY NOT BE DISCLOSED
21 WITHOUT EXPRESS ORDER OF THE
22 COURT."

23 Said Confidential Discovery Material and/or other papers shall be kept under seal until
24 further order of the Court; however, said Confidential Discovery Material and other
25 papers filed under seal shall be available to the Court and counsel of record, and to all
26 other persons entitled to receive the confidential information contained therein under the
27 terms of this Order.

28 13. a. Nothing in this Order shall prevent or restrict counsel for any party
in any way from inspecting, reviewing, using or disclosing any Discovery Material

1 produced or provided by that party, including Discovery Material designated as
2 confidential.
3

4 b. Nothing shall prevent disclosure beyond that required under this
5 Order if the producing party consents in writing to such disclosure, or if the Court, after
6 notice to all affected parties, orders such disclosure and that Order is not subject to an
7 appellate stay within twenty (20) days after it is issued.
8

9 c. No disclosure pursuant to this paragraph 11 shall waive any rights
10 or privileges of any party granted by this Order.

11 14. This Protective Order shall not enlarge or affect the proper scope of
12 discovery in this or any other litigation, nor shall this Protective Order imply that
13 Discovery Material designated as confidential under the terms of this Protective Order is
14 properly discoverable, relevant or admissible in this or any other litigation.
15

16 15. The entry of this Protective Order shall be without prejudice to the rights of
17 the parties, or any one of them, or of any non-party to assert or apply for additional or
18 different protection at their discretion.

19 16. All counsel of record in this litigation shall make a good faith effort to
20 comply with the provisions of this Protective Order and to ensure that their clients do so.
21 In the event of a change in counsel, retiring counsel shall fully instruct new counsel of
22 their responsibilities under this Order.
23

24 17. The terms of this Order shall survive and remain in effect after the
25 termination of this Litigation. The parties shall take such measures as are necessary
26 and appropriate to prevent the public disclosure of Confidential Discovery Material,
27 through inadvertence or otherwise, after the conclusion of this Litigation.
28

1
2 18. Within fifteen (15) days of the termination of this Litigation as to the
3 producing party, including all appeals, the parties shall return to counsel for the
4 producing party the Confidential Discovery Material produced by the other party and all
5 copies thereof, or the parties may agree upon appropriate methods of destruction.

6 19. If Confidential Material in the possession of a receiving party is
7 subpoenaed by any court, administrative or legislative body, or any other person or
8 organization purporting to have authority to subpoena such data or information, the
9 party to whom the subpoena is directed shall not, to the extent permitted by applicable
10 law, provide or otherwise disclose such documents or information without waiting ten
11 (10) business days after first notifying counsel for the producing party in writing of: (1)
12 the information and documentation which is requested for production in the subpoena;
13 (2) the date on which compliance with the subpoena is requested; (3) the location at
14 which compliance with the subpoena is requested; (4) the identity of the party serving
15 the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge,
16 civil action or other identification number or other designation identifying the litigation,
17 administrative proceeding or other proceeding in which the subpoena has been issued.

18 20. Inadvertent production of documents subject to work-product immunity,
19 the attorney-client privilege or other legal privilege protecting information from discovery
20 shall not constitute a waiver of the immunity or privilege, provided that the producing
21 party shall promptly notify the receiving party in writing of such inadvertent production.
22 If reasonably prompt notification is made, such inadvertently produced documents and
23 all copies thereof, as well as all notes or other work product reflecting the contents of
24 such materials, shall be returned to the producing party or destroyed, upon request, and
25
26
27
28

1 such returned or destroyed material shall be deleted from any litigation-support or other
2 database. No use shall be made of such documents during deposition or at trial, nor
3 shall they be shown to anyone who was not given access to them prior to the request to
4 return or destroy them. The party returning such material then may move the Court for
5 an order compelling production of the material, but such motion shall not assert as a
6 ground for entering such an order the fact or circumstances of the inadvertent
7 production.
8
9

10 21. This Order does not restrict or limit the use of Confidential Discovery
11 Material at any hearing or trial. Nothing in this Order, however, shall prevent any party
12 from seeking an appropriate protective order to govern such use of Confidential
13 Discovery Material at a hearing or trial.

14 22. This Order shall not prevent any persons bound hereby from making use
15 of information or documents without the restrictions of this Order if the information or
16 documents are lawfully in their possession and/or lawfully obtained through discovery in
17 this litigation or in any related state court litigation in which such information was not
18 designated as "confidential" or subject to a protective order or court order as
19 "confidential" or subject to confidential treatment, or where there has been a final
20 judgment (including any appeal therefrom) declaring that such information or documents
21 are not confidential.
22
23
24
25
26
27
28

1
2 **IT IS SO ORDERED.**

3 Dated: January 29, 2002

4 Barbara J. Rothstein
5 THE HONORABLE BARBARA J. ROTHSTEIN
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A

EXHIBIT A
EXPERT WITNESS ENDORSEMENT OF AGREED PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated confidential are provided to me subject to the Agreed Protective Order for the Protection of Confidential Information dated _____, _____ (the "Protective Order"), in the above-captioned litigation; that I have been given a copy of and have read the Agreed Protective Order, and that I agree to be bound by its terms. I also understand that my execution of this Agreed Protective Order, indicating my agreement to be bound by the Agreed Protective Order is a prerequisite to my review of any information or documents designated as confidential pursuant to the Agreed Protective Order.

I further agree that I shall not disclose to others, except in accord with the Agreed Protective Order, any Confidential Discovery Material, in any form whatsoever, and that such Confidential Discovery Material, in any form whatsoever, and that such Confidential Discovery Material and the information contained therein may be used only for the purposes authorized by the Agreed Protective Order.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such Discovery Material and information will continue even after this litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Western District of Washington, for the purposes of any proceedings relating to enforcement of the Protective Order.

1 I further agree to be bound by and to comply with the terms of the Agreed
2 Protective Order as soon as I sign this Agreement, whether or not the Agreed Protective
3 Order has yet been entered as an Order of the Court.

4 Date: _____

5 By: _____

6 Subscribed and sworn to before me this
7 _____ day of _____, 2001.

8
9 Notary Public
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28